DOCKET NO.: FST-CV-17-6032293-S	:	**SUPERIOR COURT**
JOHN DIAS	:	**J.D. OF STAMFORD/NORWALK**
V.	:	**AT STAMFORD**
CITY OF NORWALK, ET AL	:	**NOVEMBER 24, 2020**

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Pursuant to Connecticut Practice Book § 17-44, et seq., the defendants, the City of Norwalk ("Norwalk") and the Redevelopment Agency of the City of Norwalk ("Agency") (collectively the "Defendants"), move for summary judgment on all counts of the Plaintiff's operative complaint dated October 14, 2020. The reasons are more particularly set forth below.

I. Statement of Facts:

a. The Subject Property

The Plaintiff, John Dias (hereinafter the "Plaintiff") purchased 20-26 Isaacs Street (hereinafter the "Subject Property") on May 10, 1999 for $660,000. *Exhibit ("Exh.") A, pg. 14, 39 - Deposition ("Depo") of John Dias; Exh. I, Plaintiff's Interrogatories ("Int.") #2(c) & #2(d); Exh. AA - Map of Subject Property/Surrounding Area.* The Subject Property contained five units. *Exh. A, pg. 19-20.* At the time the Plaintiff purchased the Subject Property, there was one tenant, a local bar named VJs, which was located at 26 Isaacs Street. *Exh. A, pg. 18-20.* Also at that time, the Plaintiff consolidated units 20, 22 and 24 and, began a restaurant and night club operation known as El Dorado in that consolidated portion of the Subject Property. *Exh. A, pg. 19-20.*[1] At the time of his purchase in May 1999, there were two public parking lots in the immediate vicinity of the Subject Property and another within walking distance. *Exh. A, pg. 39-*

[1] 24 Isaac Street Corporation was established to operate the restaurant and night club. *Exh. I, Int. #25(f).*

40. The Yankee Doodle Garage is within walking distance and is only a three minute walk from the Subject Property. *Exh. S - Google directions from Yankee Doodle Garage to the Subject Property*. Further, when the Plaintiff purchased the Subject Property, there was significant parking available on Main Avenue, Belden Street and Wall Street. *Exh. A, pg. 39-40, 136*. At no time did the Plaintiff possess an easement, lease or other right greater than that of the general public to utilize the parking lots in the Isaacs Street neighborhood.

The Plaintiff moved back to Portugal in 2010 and resides there most of the year. *Exh. A, pg. 10*. Since 2010, the Plaintiff's son, Phillip Dias, has been his power of attorney. *Exh. A, pg. 17; Exh. B, pg. 15 - Depo of Phillip Dias*. However, the Plaintiff's son only signs documents and is not involved in the day-to-day business activities. *Exh. B, pg. 16, 21-22*.

In 2019, the Subject Property was vacant and rundown. *Exh. T - Notice of Blight letter and Photographs displaying blight on the Subject Property; Exh. U - Blight Lawsuit*. A notice of blight letter was sent to the Plaintiff on January 22, 2019 and a municipal notice of assessment and enforcement was instituted with the court in August 2019. *Exh. T; Exh. U*.

In July 2020, the Subject Property was removed from the Land Disposition Agreement (the "LDA"). *Exh. BB - Plaintiff's fourth (operative) amended complaint, 1st & 2nd Counts ¶ 23*. On September 2, 2020, the Plaintiff sold the Subject Property to IJ Group Oz, LLC for One Million Five Hundred Thousand Dollars ($1,500,000). *Exh. BB, 1st & 2nd Counts ¶ 24*.

b. The Redevelopment Plan and Project Site

On May 19, 2004, Norwalk's Housing Authority reviewed and approved a redevelopment plan entitled "Wall Street Redevelopment Plan," in accordance with Chapter 130 of the General Statutes ("Redevelopment Plan"). On June 2, 2004, the Norwalk Planning Commission found the Redevelopment Plan to be in accordance with the Norwalk Plan of

Conservation and Development. After three public hearings on the Redevelopment Plan in early 2004, the Agency approved the Redevelopment Plan on June 24, 2004. The Planning Committee of the Common Council conducted a public hearing on the Redevelopment Plan in July 2004. On July 13, 2004, Norwalk approved the Redevelopment Plan. *Exh. H ¶ 3 - Plaintiff's third amended complaint.* The Redevelopment Plan was recorded on July 14, 2004 in Volume 5490 at Page 170 of the Norwalk Land Records.

On November 30, 2004, the Defendants issued a Request for Proposals for a portion of the redevelopment area addressed in the Redevelopment Plan, known as Parcel 2A ("Project Site"); the Subject Property is located within the Project Site. *Exh. C, pg. 100 - Depo of Tim Sheehan.* After receiving bids, the Defendants conditionally approved POKO-IWSR Developers, LLC (collectively referred to as "POKO") as their approved redeveloper for the Project Site. *Exh. E, pg. 20 - Depo of Munro Johnson; Exh. H, ¶ 5.* On September 13, 2005, Norwalk authorized the Agency to enter into exclusive negotiations with POKO as the designated redeveloper for the Project Site. *Exh. J - March 20, 2006 Letter.* In November 2007, the Defendants approved POKO as the redeveloper and on November 14, 2007, the Defendants and POKO entered into a mutually agreeable LDA. *Exh. H ¶ 5.*[2] The LDA was recorded on November 15, 2007 in Volume 6684 at Page 1 of the Norwalk Land Records.[3]

Pursuant to the Defendants' agreements with POKO, if the acquisition of a portion of the Project Site, including the Subject Property, was necessary for the development of the Project Site, it was to be acquired by POKO, and not either of the Defendants. *Exh. E, pg. 32-33.* With

---

[2] POKO later assigned its rights and obligations under the LDA to IWSR Owners, LLC, an entity wholly owned by POKO. For sake of clarity, POKO-IWSR Developers, LLC and IWSR Owners, LLC will be referred to collectively herein as "POKO".

[3] The LDA was amended on October 24, 2014 and on July 24, 2015 to modify certain project deadlines.

the exception of attending a few Common Council meetings, the Plaintiff did not otherwise object to, inquire, or participate in the numerous public hearings or meetings regarding the Redevelopment Plan. *Exh. A, pg. 43-44, 127-128.* The Plaintiff did not provide any written documentation or tangible proof that he objected to, inquired into or otherwise participated in the numerous public hearings or meetings regarding the Redevelopment Plan for the Project Site.

c. The 2008 Purchase and Sale Agreement

After receiving conditional approval as the Defendants approved redeveloper, POKO forwarded letters to all property owners within the Project Site regarding the redevelopment. A March 20, 2006 letter from POKO to the Plaintiff explained:

> The property located at 20 ISAACS STREET, Tax ID 1-29-63-0 is located within the boundaries of the Redevelopment Parcel 2A and has been designated for acquisition by the City of Norwalk. Should this property be determined essential to the redevelopment effort proposed by POKO Partners, LLC and the Norwalk Redevelopment Agency then the property will be acquired by the City. Please note that this letter is required to be sent to all owners of real property within the Redevelopment Parcel #2A project area **and does not necessarily mean that your property will be acquired.** Rather it is formal notification of the potential for acquisition.

Exh. E, pg. 9; Exh. H ¶ 4; Exh. J.

After receiving the March 20, 2006 letter, the Plaintiff did not meet or otherwise contact any representatives of the Defendants or other municipal body concerning the Subject Property's inclusion in the Redevelopment Plan with the exception of one alleged meeting with then Mayor Moccia. *Exh. A, pg. 45.* Besides that, the Plaintiff conceded that he only attended a couple of Common Council meetings concerning the Redevelopment Plan. *Exh. A, pg. 127-128.* The Plaintiff further conceded that he did not speak at the meetings. *Exh. A, pg. 128.* Instead, he just sat and listened. *Exh. A, pg. 128.* The Plaintiff did not provide any written documentation or tangible proof that he met with then Mayor Moccia. The Plaintiff could not recall which

municipal meetings he attended and could not provide any specifics concerning any of those meetings regarding the Redevelopment Plan for the Project Site.

Following receipt of the March 20, 2006 letter, the Plaintiff never attempted to sell the Subject Property because, according to the Plaintiff, no one would buy it. *Exh. A, pg. 53.* While the Plaintiff further claims he also could not rent the Subject Property because he could not secure any tenants who would sign multi-year leases, a letter from the Plaintiff's prior counsel proves that he had two month-to-month tenants at the Subject Property as late as 2008. *Exh. A, pg. 54; Exh. B, pg. 42; Exh. K - March 31, 2008 Letter.*[4]

In 2007 or 2008, POKO and the Plaintiff began negotiations for the purchase and sale of the Subject Property. *Exh. A, pg. 54-55, 63-64; Exh. K; Exh. L - Warranty Deed between POKO and Plaintiff; Exh. M - Agreement between POKO and Plaintiff; Exh. N - First Amendment to Agreement between POKO and Plaintiff.* Prior to and during these negotiations, the Agency commissioned two appraisals to be conducted to assist in the sale of the Subject Property. *Exh. W - February 1, 2006 appraisal; Exh. X - February 8, 2007 appraisal.* These appraisals found the fair market value of the property to be $1,330,000 and $1,625,000. *Exh. W; Exh. X.*[5]

Ultimately, an agreement was reached between the Plaintiff and POKO for $2,500,000. *Exh. A, pg. 64-65; Exh. B, pg. 85; Exh. I, Int. #8 and #9, Exh. K; Exh. L; Exh. M; Exh. N.* Although the $2,500,000 purchase price was well above the fair market value of the Subject

[4] The Plaintiff conceded that most of the tenants in the studio apartment above VJs were his employees at the restaurant/nightclub. *Exh. A, pg. 108.* The Plaintiff was also unaware of the percentage of times the studio apartment was vacant between March 2006 and June 2019. *Exh. A, pg. 108-109; Exh. B, pg. 55.*
[5] These appraisal amounts for the Subject Property are closely aligned with the assessed value of the Defendants' appraiser, Patrick Wellspeak. *Exh. R.*

Property at that time, POKO was willing to pay above fair market value in order to acquire the properties within the Project Site more expeditiously. *Exh. E, pg. 32-33, 53; Exh. R.*

POKO never purchased the Subject Property in 2008. *Exh. A, pg. 65.* It is reasonable to assume that the economic recession, which significantly impacted the United States' real estate market, had at least some influence on POKO's inability to purchase the Subject Property. The Plaintiff admitted that his contract for the sale of the Subject Property was with POKO, and has no evidence that the Defendants were involved with the sale of the Subject Property or the POKO contract. *Exh. A, pg. 71, 75; Exh. K; Exh. L; Exh. M; Exh. N.*

d. POKO's Wall Street Place Development

As contemplated by the LDA, Norwalk conveyed both the Isaacs Street and Leonard Street municipal parking lots to the Agency, which then conveyed them to POKO; each are located within the Project Site. *Exh. BB, 1st & 2nd Counts ¶ 12.* These transfers were completed by a quit claim deed on October 31, 2008 and were recorded on the Norwalk Land Records on December 5, 2008 in Volume 6901 at Page 0190. *Exh. BB, 1st & 2nd Counts ¶ 12.* POKO intended to demolish both lots and replace them with a mixed use development that included both private and public parking as well as residential, retail and cultural/performance space.

POKO began construction on the Isaacs Street lot adjacent to the Subject Property in 2015 and ceased in the spring of 2016, after one of POKO's principal members died. *Exh. A, pg. 103; Exh. E, pg. 63; Exh. F, pg. 17 - Depo of William Ireland; Exh. BB, 1st & 2nd Counts ¶¶ 16-21.* Between September 9, 2014 and March 18, 2016, POKO obtained a demolition permit, a foundation permit and a superstructure permit. *Exh. F, pg. 42-44; Exh. BB, 1st & 2nd Counts ¶¶ 16, 18.* The Plaintiff did not object or otherwise inquire into the issuance of these permits. In fact, between August 20, 2008 and February 17, 2016, POKO appeared before numerous

municipal committees and commissions concerning zoning issues with the Redevelopment Plan project. *Exh. G, pg. 45-58 - Depo of Steve Kleppin; Exh. D, pg. 44 - Depo of Dori Wilson.* The Plaintiff has provided no tangible evidence that he objected to the issuance of any permits.

When construction commenced on the Isaacs Street lot in 2015, the Leonard Street lot was closed between that time and the spring of 2016. *Exh. A, pg. 103; Exh. F, pg. 17.* Once construction ceased in the spring of 2016, the Leonard Street lot was re-opened. *Exh. A, pg. 136-137.* Throughout this entire construction project, there was still available conveniently located parking on Wall Street and the immediate surrounding areas. *Exh. A, pg. 137, 141-142; Exh. S.* Finally, the Plaintiff's own photographs display that a five inch encroachment on the four foot easement did not restrict pedestrian access to his property. *Exh. DD - Photographs of Easement.*

Today, the portion of the Wall Street Place development exists on what once was the Isaacs Street lot. This development has been subject to ongoing and multiple litigations.

e. Plaintiff's Attempts to Rent or Sell the Subject Property; Renters/Income

The Subject Property, generally, was fully rented from the time of the Plaintiff's purchase until the spring of 2008 when the local bar known as VJs terminated its lease because the owner retired. *Exh. A, pg. 54, 100; Exh. B, pg. 41, 54; Exh. I, Int. #25(f).* While the Plaintiff claims that other people were interested in renting the property that VJs had vacated but elected not to do so as a result of the Redevelopment Plan, the Plaintiff was unable to provide any names, details, documentation or other tangible proof that those prospective renters, in fact, existed or lost interest due to the fact that the Subject Property was located within the Project Site area. *Exh. A, pg. 101*-103; *Exh. B, pg. 43-44.* After the departure of VJs, the Plaintiff did not hire a broker or realtor, or proactively attempt to rent the space left by VJs within the Subject Property. *Exh. A, pg. 119, 121-122, 126; Exh. B, pg. 43, 46-49.*

As noted above, the Subject Property was almost sold by the Plaintiff to POKO in 2008 for $2,500,000. *Exh. A, pg. 54-55, 63-64; Exh. K; Exh. L; Exh. M; Exh. N.* Despite POKO's inability to close on the Subject Property in 2008, POKO continued to attempt to purchase the Subject Property into 2014. *Exh. A, pg. 199; Exh. Y - Legal Bill.* In 2019, a third party expressed interest in purchasing the Subject Property. *Exh. A, pg. 77-80.* In January 2020, the Plaintiff claims that an offer was made to purchase the Subject Property for $2,250,000. *Exh. CC, Int. # 10 - January 28, 2020 Plaintiff's Supplemental Int.* Finally, on September 2, 2020, the Plaintiff sold the Subject Property to IJ Group Oz, LLC for $1,500,000. *Exh. BB, 1st & 2nd Counts ¶ 24.*

The Plaintiff' restaurant/nightclub, El Dorado, had stable gross receipts or sales that ranged from $188,064 and $258,426, from 2009 through 2015, the year that construction commenced. *Exh. A, pg. 103; Exh. Z – 24 Isaac Street Corp. Tax Returns.* El Dorado's gross receipts decreased in 2016 and 2017, after the Leonard Street lot had been re-opened for public use and there was still available parking on Wall Street and the immediate surrounding areas, including the Yankee Doodle Garage. *Exh. A, pg. 137, 141-142; Exh. Z.* El Dorado was in business until July 2017. *Exh. A, pg. 110; Exh. I, Int. #25(f).*

Although the Plaintiff conceded, during his deposition, that he never hired a broker or realtor, or otherwise proactively attempted to sell the Subject Property or to rent the vacant El Dorado space, there was, in fact, interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 53, 77-80, 119, 121-122, 126; Exh. Y.*

f. The Action; The Appraisals

The Plaintiff's operative four count complaint, dated October 14, 2020, sounds in inverse condemnation (temporary taking only) and unjust enrichment. *Exh. BB.*

The Plaintiff did not specifically identify when the alleged taking took place in the operative complaint. *Exh. BB, 1st & 2nd Counts.* The Plaintiff's discovery responses allege the taking took place on August 8, 2018. *Exh. A, pg. 191-192; Exh. V, Int. # 19 - May 16, 2019 Plaintiff's Supplemental Int.* However, the Plaintiff testified that the alleged taking took place in 2015 when construction began on the Isaacs Street lot. *Exh. A, pg. 115.* The Plaintiff also appears to have claimed a taking occurred when the Redevelopment Plan was approved in 2004 or the LDA was recorded in 2007. Finally, as detailed further below, in the Plaintiff's two appraisal reports, the Plaintiff's appraiser identified the value of the Subject Property as of November 15, 2007 and August 8, 2018, but did not identify a value as of 2015.

On November 23, 2018, the Plaintiff disclosed an appraisal of the Subject Property, valuing it at $2,185,000. *Exh. O, pg. 2-4 - Appraisal Report.* The report determined the current estimate of the Subject Property for condemnation purposes as of August 8, 2018. *Exh. O.*[6] The Plaintiff's appraiser does not define minimal value. *Exh. O.*

On February 4, 2019, the Defendants disclosed the appraisal report of their expert witness, Patrick Wellspeak. *Exh. P, pg. 1-2 - Appraisal Report.* Mr. Wellspeak concluded that the value of the Subject Property as of July 23, 2018 was $715,000. *Exh. P.*

On February 12, 2019, the Plaintiff disclosed a *second* appraisal of the Subject Property valuing it as $2,500,000 as of November 15, 2007. *Exh. Q, pg. 1-3 - Appraisal Report.* Thus, according to the Plaintiff's own appraisals, the value of the Subject Property had only decreased by $315,000. *Exh. O, pg. 2-4; Exh. Q, pg. 1-3.* Of particular note here is the Plaintiff's testimony that the Subject Property was inversely condemned only when POKO began

[6] The appraiser further stated that the Subject Property is unmarketable and has minimal value except to Norwalk, the Agency, or a subsequent redeveloper. *Exh. O, pg. 2-4.*

construction on the Isaacs Street parking lot in 2015. *Exh. A, pg. 116-117.*[7] The POKO construction ceased in the spring of 2016. *Exh. A, pg. 116-117; Exh. F, pg. 17.*

On August 15, 2019, the Defendants disclosed Mr. Wellspeak's supplemental expert witness report. *Exh. R, pg. 1-2 - Appraisal Report.* Mr. Wellspeak concluded that, as of November 15, 2007, the Subject Property had a market value of $1,550,000. *Exh. R.*

II. There Is No Genuine Issue Of Material Fact That The Subject Property Has Not Been Inversely Condemned, Or That The Defendants Have Not Been Unjustly Enriched And, Therefore, The Defendants Are Entitled To Judgment As A Matter of Law

As noted above, the Plaintiff appears to argue that the Defendants inversely condemned the Subject Property (1) in 2004, when the Redevelopment Plan was approved; (2) on November 15, 2007, when the LDA was recorded; (3) in 2015, when POKO began construction on the Wall Street Place development (the prior Isaacs Street parking lot); and/or (4) August 8, 2018, the date of the Plaintiff's first appraisal. *Exh. A, pg. 115, 191-192; Exh. H, 1st & 2nd Counts ¶ 35; Exh. O; Exh. V, Int. #19; Exh. BB, 1st & 2nd Counts ¶ 22.* The Plaintiff also claims that the Defendants were unjustly enriched by the purported taking. *Exh. BB, 3rd & 4th Counts.* In light of the recent sale of the Subject Property, the Plaintiff claims that the Defendants' actions constituted a temporary taking within the meaning of the Connecticut and United States' Constitutions. *Exh. BB, 1st & 2nd Counts ¶ 26.* However, as detailed further below, there is no genuine issue of material fact that the Defendants did not inversely condemn the Subject Property, temporarily, on any of these dates, or any other dates not yet revealed by the Plaintiff. Moreover, there is no genuine issue of material fact that the Defendants were not unjustly enriched by their actions or

[7] The Plaintiff clearly testified during his deposition that his Subject Property has no value at all as a result of the Defendants' Redevelopment Plan. *Exh. A, pg. 79-80.*

inaction. Accordingly, the Defendants are entitled to judgment as a matter of law on all counts of the Plaintiff's operative complaint. *Exh. BB.*

III. Law and Argument:

A. Motion for Summary Judgment Standard

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law … The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried …" *Grenier v. Commissioner of Transportation*, 306 Conn. 523, 534-35 (2012). "As the party moving for summary judgment, the [movant] is required to support its motion with supporting documentation, including affidavits." *Heyman Associates No. 1 v. Insurance Co. of Pennsylvania*, 231 Conn. 756, 796 (1995). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party…" *Patel v. Flexo Converters U.S.A., Inc.*, 309 Conn. 52, 57 (2013).

The Connecticut Supreme Court's recitation of the law in *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1 (2008) as it pertains to summary judgment is helpful here:

> In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact … As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent … When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue ... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue …

> It is not enough, however, for the opposing party merely to assert the existence of such disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45].

Id., at 10-11.

B. Summary of Inverse Condemnation Law

Government appropriation of private property may occur directly through the eminent domain process, in which the government acquires title to property and pays for its action, or indirectly through government action or regulation that has the effect of appropriating property but is not accompanied by efforts to acquire title or recognition of an obligation to pay just compensation. This latter scenario is known as inverse condemnation. "Connecticut courts have recognized the well-established constitutional principle that '[t]he owner of land taken by condemnation is entitled to be paid just compensation.'" *City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 71 (2007) citing *Conn. Const. art. I, § 11; see also U.S. Const., amend. V.*

Connecticut, like the majority of jurisdictions, limits the scope of inverse condemnation, or de facto takings, by requiring that there be more than a value depressing act. *Nichols on Eminent Domain* (3rd Ed.), Vol. 8A, § 18.06[1][i]. Connecticut's requirements for a finding of a de facto taking are set forth in *Textron, Inc. v. Wood*, 167 Conn. 334, 346-347 (1974): "There must be at least some legal interference with the owner's power of disposition over the property, a substitution of the condemnor's domain and control over the property for that of the condemnee." Put differently, there can be no finding of a taking unless the property cannot be utilized for any reasonable and proper purpose. *Wright v. Shugrue*, 178 Conn. 710, 714 (1979). Indeed, "Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property." *City of Bristol*, 284 Conn. at 85; *Tamm v. Burns*, 222 Conn. 280, 284 (1992) ("there is no taking

in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose ... as where the economic utilization of the land, is for all practical purposes destroyed.").

Several cases are helpful on this point. For example, in *City of Bristol*, supra, the Connecticut Supreme Court held that Tilcon was not deprived of all reasonable and proper use of the property because the groundwater, which was contaminated by an adjacent landfill's runoff, had no effect on its present mining-related activities and Tilcon introduced no evidence that the property could not be marketed for residential development even if burdened by a stigma [of its property being contaminated by a landfill]. *Id.* at 85-86. Similarly, in *Citino v. City of Hartford Redevelopment Agency*, 1997 WL 53318, at *13 (Jan. 30, 1997), the trial court held that because "the [Squire Street] building does have some physical use for a purpose permitted in the underlying zone it would not fall into the classic definition of inverse condemnation."

There are two categories of inverse condemnation, physical and regulatory.[8] A physical taking is an actual occupation of private property or exclusion of an owner from possession. An example of a physical invasion taking is the decision of the U. S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) in which it found that a local ordinance requiring landlords to accept the installation of cable TV equipment in apartment buildings was a physical taking.

[8] Takings also may be permanent or temporary. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987). The U.S. Supreme Court also noted that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318. See, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657, (1981) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable"). The takings clause already assumes the Government is acting in the public interest. *Florida Rock Indus., Inc. v. U.S.*, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

A regulatory taking, on the other hand, is a taking in which the use of property is restricted not by physical occupation, but by the imposition or enforcement of a land use regulation or restriction. For example, in the *Penn Central Transportation, Co. v. City of New York*, 438 U.S. 104 (1978), New York City's Landmarks Commission imposed on Grand Central Station a regulation that prohibited its owners from building within the air space above the Station, and transferred the development rights to that space to other properties.

Inverse condemnation claims, whether physical or regulatory, have been further subdivided by the federal courts into two categories: "categorical takings," also known as *Lucas* takings, which arise from a total loss of economic use; and takings based on a substantial but less-than-total loss, which are known as *Penn Central* takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central*, 438 U.S. at 104.[9]

In the present matter, while the Plaintiff testified that the Defendants' actions caused the Subject Property to have no value at all (*Lucas* taking), the Plaintiff did not assert a *Lucas* taking in his operative complaint. *Exh. A, pg. 79-80; Exh. BB, 1st & 2nd Counts*. However, the Plaintiff does assert that the Defendants' Redevelopment Plan/LDA caused the destruction or substantial restriction of the beneficial uses of the Subject Property (*Penn Central* taking). *Exh. BB, 1st & 2nd Counts* ¶ *22*. Therefore, the Defendants' motion for summary judgment will discuss both *Lucas* takings and *Penn Central* takings. Either way, there is no genuine issue of material fact

[9] "For purpose of an inverse condemnation claim, the federal standard, and that applicable to a state claim are almost indistinguishable, and Article first, S. 11 provides the same protections for property owners as the protection provided by the Fifth Amendment of the Constitution of the United States. *Santos v. Town of Stratford*, 2014 WL 4494622, at *3 (Aug. 5, 2014); *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 249-250 (1995).

that the Plaintiff's claims must fail and, therefore, that the Defendants are entitled to judgment as a matter of law.

1. There is no genuine issue of material fact that the Plaintiff cannot prove total loss of economic use – Categorical Taking under *Lucas*

Lucas governs regulations that have the effect of a total wipe-out of economic use and held that government action depriving property owners of all economically beneficial use of property is a per se taking, without regard to other factors. *Id.* at 1003, 1017-19.

In 1986, Lucas paid $945,000 for two beachfront lots that were fully approved for single-family home construction. *Id.* at 1006-07. In 1988, the South Carolina legislature enacted a law, which established a line in the sand, seaward of which residential development was prohibited. *Id.* at 1007. The Act described the severe public harm that might result from residential development adjacent to the ocean. *Id.* at 1040. Lucas' lots were seaward of this new line. *Id.* at 1007. Lucas claimed that this prohibition rendered his beachfront lots valueless. *Id.*

The U.S. Supreme Court found that the South Carolina government, had, in fact, inversely condemned Lucas' property, stating that the property has lost such use when government action forces the property to remain economically idle, that is, "called upon to sacrifice *all* economically beneficial uses" and is incapable of being used to produce some economic return. *Id.* at 1019. (emphasis in original).

In the present case, the Plaintiff testified that there has been a total destruction of the beneficial use of the Subject Property as a result of the Defendants' actions in 2004, 2007, 2015 and/or 2018. *Exh. A, pg. 79-80, 191-192; Exh. O; Exh. V, Int. # 19.* The Plaintiff claims that, as a result of Defendants' actions, he could not sell it, he could not rent it, and he could not run his

business on it. *Exh. A, pg. 53-54, 110; Exh. B, pg. 42*; *Exh. I, Int. #25(f)*. In short, he testified that the Subject Property has no value at all. *Exh. A, pg. 79-80.*

First, the Plaintiff has failed to prove that a *Lucas* taking occurred when the Redevelopment Plan was approved in 2004 or following the recording of the LDA in 2007. Specifically, there is no evidence that he lost income in 2004 or 2007, that he was unable to rent his property, that he could not sell his property if he wanted to, or that his business, the El Dorado, was losing money. *Exh. A, pg. 53-54, 110; Exh. B, pg. 42*; *Exh. I, Int. #25(f); Exh. Z.* Indeed, as of 2004 and in November 2007, the Subject Property was fully rented and producing income. *Exh. A, pg. 138.* Moreover, beginning in 2007, POKO began negotiations with the Plaintiff in an attempt to purchase the Subject Property from the Plaintiff. POKO eventually agreed to a $2,500,000 purchase price, which is almost four times more than the Plaintiff purchased it for in 1999. *Exh. A, pg. 199; Exh. I, Int. #8, #9.* Although POKO did not purchase the property in 2008 -- presumably due, at least in large part, to the economic recession occurring at that time -- POKO continued to try and purchase the Subject Property from the Plaintiff into 2014. *Exh. Y.* Notably, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018, not 2004 or 2007. *Exh. V, Int. # 19.* In other words, there is no evidence that the approval of the Redevelopment Plan in 2004 or the recording of the LDA on the Norwalk Land Records in 2007 forced the Subject Property to remain economically idle, that is, "called upon to sacrifice all economically beneficial uses," or that the Subject Property was incapable of being used to produce some economic return. *Lucas*, 505 U.S. at 1020. Finally, the statute of limitations precludes the Plaintiff from filing a claim for inverse condemnation which allegedly took place in either 2004 or 2007 as the initial complaint was filed in 2017, and is

outside the three year statute of limitations. *LeStrange v. Town of Oxford*, 1997 WL 707106 * 2 (Nov. 4, 1997) (from the date of accrual of the condemnation action); *General Statutes § 52-577.*

Second, the Plaintiff has also failed to prove that a *Lucas* taking occurred in 2015 following the commencement of construction on the Isaacs Street lot. Specifically, he has provided no appraisal displaying a decrease in the value of the Subject Property in 2015 following the POKO construction. *Exh. O; Exh. Q.* Thus, the Plaintiff's claim that the lack of parking on the Isaacs Street lot during construction destroyed the value of the Subject Property and business is unsupported by any evidence. Moreover, the Plaintiff's claim regarding his purported loss of parking ignores the fact that there was ample parking in the surrounding areas at all times and the Leonard Street lot re-opened once construction ceased in 2016. *Exh. A, pg. 39-40, 116-117, 136-137, 167; Exh. F, pg. 17; Exh. S.* The Plaintiff's business also had stable gross receipts or sales that range from $188,064 and $258,426 through the year of the demolition of the Isaacs Street parking lot in 2015. *Exh. A, pg. 103; Exh. Z.* The decrease in gross receipts in 2016 and 2017 cannot be causally connected to the loss of parking in 2015 as there was still available parking in the immediate surrounding areas. *Exh. A, pg. 137, 141-142.* Finally, following the retirement of his tenant, VJs, the Plaintiff failed to be flexible with new potential renters and would not offer month-to-month leases like he had in the past, was not proactive in seeking renters out and did not retain a real estate agent, utilize the MLS service or make other concessions, such as lowering rent or accepting single-year leases, to try and find renters. *Exh. A, pg. 53-54, 101-103, 119, 121-122, 126; Exh. B, pg. 43, 46-49; Exh. K.* In fact, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018. *Exh. V, Int. # 19.* As with the Plaintiff's first two claims of inverse condemnation, there is no evidence that the Wall Street Place construction in 2015 forced the Subject Property to remain economically idle,

that is, "called upon to sacrifice all economically beneficial uses," or that the Subject Property was incapable of being used to produce some economic return. *Lucas*, 505 U.S. at 1020.

Third, the Plaintiff also failed to prove that a *Lucas* taking occurred in August 2018, the date of the Plaintiff's first appraisal. This appraisal displays that the Subject Property was worth $2,185,000 and thus, only decreased by $315,000 since 2007. *Exh. O; Exh. Q.* In addition, there was interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 77-80; Exh. Y.* Thus, in August 2018, there was no evidence that it was forced to remain economically idle, that is, "called upon to sacrifice all economically beneficial uses," or that the Subject Property was incapable of being used to produce some economic return. *Lucas*, 505 U.S. at 1020.

In sum, the Plaintiff failed to provide any evidence that the Subject Property was forced to remain economically idle, that all economic beneficial uses of the Subject Property were precluded and there was a total destruction in the value of the Subject Property as a result of the Defendants' actions or inaction. *Lucas*, 505 U.S. at 1020. Moreover, the Plaintiff conceded that he never proactively sought renters or attempted to sell the Subject Property. *Exh. A, pg. 53-54, 119, 121-122, 126; Exh. B, pg. 43, 46-49.* Despite that, there was still interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 77-80, 199; Exh. Y.* Both common sense and public policy dictate that the Plaintiff had at least some responsibility to mitigate his alleged damages. *Sponzo v. Astro Aircom, LLC*, 2008 WL 821583, at *4 (March 14, 2008).

Therefore, the Defendants move for summary judgment because the Plaintiff has not satisfied the criteria of a takings claim under *Lucas*, for a total loss of economic use and a property lacking any value at all, otherwise known as a categorical taking.

2. There is no genuine issue of material fact that the Plaintiff cannot prove a taking based on a substantial, but less than total loss of economic use – *Penn Central*

Takings involving a partial loss of economic use -- that is, where the property is not valueless, are analyzed by using a three-factor balancing inquiry stated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Justice Brennan articulated the three touchstones as: (1) the economic impact of the regulation on the property owner; (2) the regulation's interference with the property owner's investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

a. Economic Impact of the Regulation on the Property Owner

In *Palazzolo v. Rhode Island*, 533 U.S.606 (2001), Justice Kennedy, reaffirmed the *Penn Central* analysis as the applicable test if the facts do not present a *Lucas* categorical taking:

> [In] *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining formulation, while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking. *Id.* at 415.
>
> Since *Mahon*, we have given some, but not too specific guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, *see infra* at 2463-2464, that a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause. *Lucas*, 505 U.S., at 1015, 112 S. Ct. 2886; *see also*, *id.*, at 1035, 112 S. Ct. 2886 (KENNEDY J., concurring); *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138 (1980). Where a regulation places limitations on land that falls short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action. *Penn Central*, supra at 124, 98 S. Ct. 2646. These inquiries are formed by the purpose of the takings clause

> which is to prevent the government from "forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563 (1960).

Palazzolo, 533 U.S. at 617-618.

The Supreme Court reversed the Rhode Island court's rejection of the takings claim on ripeness grounds, held that the plaintiff had retained some economic use of his land, and remanded with direction to conduct a *Penn Central* inquiry. *Palazzolo*, 533 U.S. at 632.

Many other courts hold that an extreme decline in property value is necessary before the impact of regulation supports a *Penn Central* claim. The Court of Federal Claims, for example, has followed this pattern before finding a regulatory taking. *Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994) (taking 92% - 100%); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 160 (1990) (taking 99%).

In addition, a substantial group of other decisions hold that even a decline in property value in the range of 90% - 95% is not enough of an economic impact to create a taking. *William C. Haas & Co., Inc. v. City and Cty. Of S.F.*, 605 F.2d 1117, 1120-21 (9th Cir. 1979) (holding 95% diminution in value insufficient). The courts require a near complete loss in property value (more than 90%) before finding a taking. *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 532-33 (N.Y. Ct. App. 2008); *Rith Energy v. U.S.*, 270 F.3d 1347, 1352 (5th Cir. 2001); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 425 (2d Cir. 1980).

In the present matter, the Plaintiff has failed to provide evidence to establish that there has been a significant enough reduction in the value of the Subject Property as a result of the Defendants' actions or inaction, in 2004, 2007, 2015 and/or 2018, to meet the threshold set forth by the Supreme Court. *Palazzolo*, 533 U.S. at 632; *Penn Central*, 438 U.S. at 124. The law is

clear that where the plaintiff retains an economically viable use of its property, an unconstitutional taking will not be found. *Penn Central*, 438 U.S. at 124.

First, the Plaintiff has failed to prove that the approval of the Redevelopment Plan in 2004 or the recording of the LDA in 2007 had any economic impact on the Subject Property. Similar to the petitioner in the *Palazzolo* case, neither the Redevelopment Plan nor the LDA restricted the use of the Subject Property in a way that would impact the Plaintiff's use of it.[10] *Id.* at 611. The Plaintiff still owned the Subject Property in 2004 and 2007. Neither the Redevelopment Plan nor the LDA precluded the Plaintiff from running his business or renting out the remaining parts of the Subject Property to current or potential future tenants. *Exh. A, pg. 44, 55, 158-159.* There is no evidence that he lost income in 2004 or 2007, that he was unable to rent his property, that he could not sell his property if he wanted to, or that his business, the restaurant/nightclub named El Dorado, was losing money. *Exh. A, pg. 53-54, 110, 138; Exh. B, pg. 42; Exh. I, Int. #25(f); Exh. Z.* In fact, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018. *Exh. V, Int. # 19.* Therefore, neither the approval of the Redevelopment Plan nor the LDA created any economic impact on the Subject Property in 2004 or 2007. The Plaintiff is also precluded from filing an inverse condemnation claim for an alleged taking in 2004 or 2007 as the initial complaint was filed in 2017, and is well outside the three year statute of limitations. *LeStrange*, 1997 WL 707106 * 2; *General Statutes § 52-577.*

Second, the Plaintiff has failed to prove that the construction on the Isaacs Street lot in 2015 had any economic impact on the Subject Property. Specifically, the Plaintiff has provided no appraisal displaying a decrease in the value of the Subject Property in 2015 following the

[10] The Plaintiff testified that he was running a restaurant/nightclub on part of the property and renting out the remaining units to tenants. *Exh. A, pg. 18-20.*

POKO construction. *Exh. O; Exh. Q.* In addition, he claims that the lack of parking destroyed the value of his property and business, but there was ample parking in the surrounding areas and the Leonard Street lot re-opened once construction ceased in 2016. *Exh. A, pg. 39-40, 116-117, 136-137, 167; Exh. F, pg. 17; Exh. S.* In addition, the Plaintiff's business had stable gross receipts or sales that range from $188,064 and $258,426 through 2015. *Exh. A, pg. 103; Exh. Z.* The decrease in gross receipts in 2016 and 2017 cannot be causally connected to the loss of parking in 2015 as there was still available parking in the immediate surrounding areas. *Exh. A, pg. 137, 141-142.* Further, following the retirement of his tenant, VJs, the Plaintiff failed to be flexible with new potential renters and would not offer month-to-month leases like he had in the past and was not proactive in seeking renters out and did not retain a real estate agent, utilize the MLS service or make other concessions to try and find renters. *Exh. A, pg. 119, 121-122, 126; Exh. K.* Notably, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018. *Exh. V, Int. # 19.* Therefore, the 2015 construction did not have a negative economic effect on the Subject Property.

Third, the Plaintiff has failed to prove that the Defendants' actions in August 2018 had any economic impact on the Subject Property. Specifically, the Plaintiff's business had stable gross receipts or sales that range from $188,064 and $258,426 through the year of the demolition of the Isaacs Street parking lot in 2015. *Exh. A, pg. 103; Exh. Z.* The decrease in gross receipts in 2016 and 2017 cannot be causally connected to the loss of parking in 2015 as there was still available parking in the immediate surrounding areas. *Exh. A, pg. 137, 141-142.* After construction ceased in the spring of 2016, the Leonard Street parking lot re-opened for public use. *Exh. A, pg. 136-137.* There was also interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 77-80; Exh. Y.*

Pursuant to *Palazzolo* and *Penn Central*, the Plaintiff has failed to meet the requirement that the economic impact of the regulation, in 2004, 2007, 2015 and/or 2018, is significant enough to constitute a taking. *Palazzolo*, 533 U.S. at 632; *Penn Central*, 438 U.S. at 124.

b. Reasonable Investment-Backed Expectations

One of the factors that courts must examine in conducting a *Penn Central* analysis is the amount of the property owner's expenditures, development efforts, and vested property rights. This inquiry is commonly referred to as an examination of the owner's reasonable investment-backed expectations.

The U.S. Supreme Court has discussed reasonable investment-backed expectations in several cases, including *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); and originally in *Penn Central*, 438 U.S. at 127. The Court has stated that "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus*, 467 U.S. at 1005-06. In analyzing this factor, the Ninth Circuit held that acquisition of property prior to a regulation "does not give [the plaintiff] a valid investment-backed expectation ... [because] when buying a piece of property, one cannot reasonably expect that property to be free of government regulation." *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015). The Court in *Penn Central* pointed to its decision in *Pennsylvania Coal Co.*, 260 U.S. at 414-415 as

> the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." [In *Penn. Coal*] the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it

> commercially impracticable to mine the coal, *id.*, at 414, 43 S. Ct., at 159 ... the Court held that the statute was invalid as effecting a "taking" without just compensation.

Penn Central, 438 U.S. at 127-128.

In the present matter, the Plaintiff has failed to provide sufficient evidence to establish that there has been an impact on his reasonable investment-backed expectations regarding the Subject Property, in 2004, 2007, 2015 and/or 2018, to meet the threshold set forth by the Supreme Court. *Pennsylvania Coal Co.*, 260 U.S. at 414-415; *Penn Central*, 438 U.S. at 127-128.

First, the Plaintiff has failed to prove that the approval of the Redevelopment Plan in 2004 or the recording of the LDA in 2007 had any impact on the Plaintiff's reasonable investment backed expectations on the Subject Property. Neither the Redevelopment Plan nor the LDA restricted the use of the Subject Property in a way that would impact the Plaintiff's ability to use it.[11] The Plaintiff still owned the Subject Property in 2004 and 2007. Neither the Redevelopment Plan nor the LDA precluded the Plaintiff from running his business or renting out the remaining parts of the Subject Property to current or potential future tenants. *Exh. A, pg. 44, 55, 158-159.* There is no evidence that he lost income in 2004 or 2007, that he was unable to rent his property, that he could not sell his property if he wanted to, or that his business, the El Dorado, was losing money. *Exh. A, pg. 53-54, 110, 138; Exh. B, pg. 42*; *Exh. Z.* In fact, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018. *Exh. V, Int. # 19.* Therefore, neither the Redevelopment Plan nor the LDA created any negative effect on the reasonable investment backed expectations on the Subject Property or his business in

[11] The Plaintiff testified that he was running a restaurant/nightclub on part of the property and renting out the remaining units to tenants. *Exh. A, pg. 18-20.*

2004 or 2007. The Plaintiff is also precluded from filing an inverse condemnation claim for an alleged taking in 2004 or 2007 as the initial complaint was filed in 2017, and is well outside the three year statute of limitations. *LeStrange*, 1997 WL 707106 * 2; *General Statutes § 52-577.*

Second, the Plaintiff has also failed to prove that the construction on the Isaacs Street lot in 2015 had any impact on the Plaintiff's reasonable investment backed expectations on the Subject Property. Specifically, the Plaintiff has provided no appraisal displaying a decrease in the value of the Subject Property in 2015. *Exh. O; Exh. Q.* In addition, he claims that the lack of parking destroyed the value of his property and business, but there was ample parking in the surrounding areas and the Leonard Street lot re-opened once construction ceased in 2016. *Exh. A, pg. 39-40, 116-117, 136-137, 167; Exh. F, pg. 17; Exh. S.* In addition, the Plaintiff's business had stable gross receipts or sales that range from $188,064 and $258,426 through 2015. *Exh. A, pg. 103; Exh. Z.* The decrease in gross receipts in 2016 and 2017 cannot be causally connected to the loss of parking as there was still available parking in the immediate surrounding areas. *Exh. A, pg. 137, 141-142.* Further, following the retirement of his tenant, VJs, the Plaintiff failed to be flexible with new potential renters and would not offer month-to-month leases like he had in the past, was not proactive in seeking renters out and did not retain a real estate agent, utilize the MLS service or make other concessions to try and find renters. *Exh. A, pg. 119, 121-122, 126; Exh. B, pg. 43, 46-49; Exh. K.* In addition, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018. *Exh. V, Int. # 19.*

Third, the Plaintiff has failed to prove that the Defendants' actions in August 2018 had any impact on the Plaintiff's reasonable investment backed expectations on the Subject Property. Specifically, the Plaintiff's business had stable gross receipts or sales that range from $188,064 and $258,426 through the year of the demolition of the Isaacs Street parking lot. *Exh. A, pg. 103;*

Exh. Z. The decrease in gross receipts in 2016 and 2017 cannot be causally connected to the loss of parking in 2015 as there was still available parking in the immediate surrounding areas. *Exh. A, pg. 137, 141-142.* After construction ceased in the spring of 2016, the Leonard Street parking lot had re-opened for public use. *Exh. A, pg. 136-137.* In addition, there was also interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 77-80; Exh. Y.*

Pursuant to *Penn Central*, the Plaintiff has failed to meet the requirement that the regulation has significantly impacted his reasonable investment-backed expectation to constitute a taking. *Penn Central*, 438 U.S. at 127-128; *Pennsylvania Coal Co.*, 260 U.S. at 414-415.

c. The Character of the Governmental Action

When employing the *Penn Central* test, the character factor is a test for whether the government physically invades property[12] or simply advances a legitimate public goal.[13] *Penn Central*, 438 U.S. at 124. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, *see e.g.*, *United States v. Causby*, 328 U.S. 256 (1945), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. The *Penn Central* court further stated that in "deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole - here, the city block designated as the 'landmark site' … [the Court also stated that they] uniformly

[12] Following the *Penn Central* analysis that the government action caused a physical invasion. *Rancho de Calistoga*, 800 F.3d at 1091; *Embassy Real Estate Holdings, LLC v. Dist. Of Columbia Mayor's Agent for Historic Preservation*, 944 A.2d 1036, 1052 n.18 (D.C. 2008).

[13] Following the *Penn Central* analysis that the government action promotes a legitimate interest. *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004); *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d Cir. 1984).

reject the proposition that diminution in value in property value, standing alone, can establish a 'taking'". *Penn Central*, 438 U.S. at 130-131.

Later, the Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) explained that the takings inquiry does not turn on questions regarding purpose of the government action, but rather on its effect. See, *San Diego Gas*, 450 U.S. at 653 ("It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.")

The diverging views of how to apply the character of the governmental action has still not been resolved as lower courts have been split on whether the character of the government action focuses on the purpose of the regulation, or whether the regulation places a burden on the property owner. In the present matter, the diverging ways to analyze this prong of the *Penn Central* test is not an issue as the Plaintiff has failed to meet the burden on either.

i. The Defendants have not physically invaded the Subject Property

A physical taking is an actual occupation of private property or exclusion of an owner from possession. A well-known example of a physical invasion taking is the 1982 decision of the U.S. Supreme Court in *Loretto*, 458 U.S. at 419 (1982), in which a local ordinance required landlords to accept the installation of cable TV equipment in apartment buildings.

In the present matter, the Plaintiff claims that the Project Site encroached within the four foot easement. *Exh. BB, 1st & 2nd Counts ¶¶ 16, 22e.* A photograph produced by the Plaintiff displays a five inch encroachment as a result of the construction fencing erected for public safety purposes around the Project Site. *Exh. DD.* This minor five inch encroachment did not restrict

pedestrian access to the Subject Property, did not deprive the Plaintiff of all use of the Subject Property and did not force it to remain economically idle. *Exh. DD; Penn Central*, 438 U.S. at 124, 127-128; *Lucas*, 505 U.S. at 1015, 1020.

ii. The Defendants advanced a legitimate public goal to promote the public good

In the present matter, the Defendants created and approved a Redevelopment Plan for the Wall Street area. *Exh. E, pg. 6.* The goal of this plan was to create a thriving downtown and affordable housing. *Exh. C, pg. 160-161; Exh. E, pg. 15*; *Penn Central*, 438 U.S. at 124 (advancing a legitimate public goal to promote the common good).

iii. Impact on the property owner

In discussing the first and second prongs of *Penn Central* above, there is no evidence to support the Plaintiff's claim that the Redevelopment Plan and the LDA impacted the Subject Property sufficiently to constitute a *Penn Central* taking under the third prong of this test either.

As indicated above, neither the Redevelopment Plan nor the LDA impacted the Plaintiff in a significant enough way to constitute a taking. Similar to the petitioner in the *Palazzolo* case, neither the Redevelopment Plan (in 2004) nor the LDA (in 2007) restricted the use of the Subject Property in a way that would impact the Plaintiff's use of it.[14] *Id.* at 611. The Plaintiff still owned the Subject Property in 2004 and 2007. Neither precluded the Plaintiff from running his business or renting out the remaining parts of the Subject Property to current or potential future tenants. *Exh. A, pg. 44, 158-159.* There is no evidence that he lost income in 2004 or 2007, that he was unable to rent his property, that he could not sell his property if he wanted to, or that his business, the El Dorado, was losing money. *Exh. A, pg. 53-54, 110, 138; Exh. B, pg. 42*; *Exh. Z.*

[14] The Plaintiff testified that he was running a restaurant/nightclub on part of the property and renting out the remaining units to tenants. *Exh. A, pg. 18-20.*

Finally, the Plaintiff is also precluded from filing an inverse condemnation claim for an alleged taking in 2004 or 2007 as the initial complaint was filed in 2017, and is well outside the three year statute of limitations. *LeStrange*, 1997 WL 707106 * 2; *General Statutes § 52-577.*

As indicated above, the Plaintiff has provided no evidence displaying a decrease in the value of the Subject Property in 2015 or that his business was substantially impacted by the Redevelopment Plan or the LDA. *Exh. O; Exh. Q; Exh. Z.* The documents and evidence display that the Plaintiff's business produced gross receipts or sales that ranged between $188,064 and $258,426 during the years 2009 through 2015. *Exh. Z.* In fact, the gross receipts and sales were better in 2015 when construction commenced and both parking lots were closed than in 2016 and 2017 when construction ended and the Leonard Street lot re-opened. *Exh. Z.* The Plaintiff's claim that lack of parking destroyed the value of the Subject Property is also without merit as there was ample parking in the surrounding areas and the Leonard Street lot re-opened once construction ceased in 2016. *Exh. A, pg. 39-40, 116-117, 136-137, 167; Exh. F, pg. 17; Exh. S.* Although the Plaintiff did not proactively seek to rent or sell the Subject Property since 2008, there was still interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 53, 77-80, 119, 121-122, 126; Exh. K; Exh. Y.* Finally, the Plaintiff's own discovery responses assert that the taking took place on August 8, 2018, not in 2004, 2007 or 2015. *Exh. V, Int. # 19.*

The Plaintiff has failed to prove that there has been an impact in August 2018 thereby establishing the third prong of a taking under the *Penn Central* test. Specifically, the Plaintiff's business had stable gross receipts or sales that range from $188,064 and $258,426 through the year of the demolition of the Isaacs Street parking lot in 2015. *Exh. A, pg. 103; Exh. Z.* The decrease in gross receipts in 2016 and 2017 cannot be causally connected to the loss of parking in 2015 as there was still available parking in the immediate surrounding areas. *Exh. A, pg. 137,*

141-142. After construction ceased in 2016, the Leonard Street lot had re-opened for public use. *Exh. A, pg. 136-137*. In addition, there was also interest in purchasing the Subject Property between 2008 and 2020. *Exh. A, pg. 77-80; Exh. Y.*

Finally, a five inch encroachment on an easement that did not restrict pedestrian access to the Subject Property does not meet the criteria for a taking under either *Penn Central* or *Lucas*. *Exh. DD; Penn Central*, 438 U.S. at 124, 127-128; *Lucas*, 505 U.S. at 1015, 1020.

No matter whether you analyze the character of government action from any of these perspectives, the impact on the property owner, the advancement of a legitimate public goal to promote the public good, or the physical invasion of property, the Plaintiff has failed to meet this standard required by the *Penn Central* decision to find that a taking has occurred. Therefore, the Defendants are entitled to summary judgment as the Plaintiff has not satisfied the criteria of a *Penn Central* claim.

3. Connecticut Inverse Condemnation Law

It is anticipated that the Plaintiff will discuss *Barton v. City of Norwalk*, 326 Conn. 139 (2017) in his objection to this motion for summary judgment. However, *Barton* is factually different from the present matter. Thus, reliance on it is misplaced.

In *Barton*, the Connecticut Supreme Court, affirmed the lower court's holdings that the plaintiff proved his inverse condemnation claim. *Id.* at 142. While *Barton* and the present matter both involve inverse condemnation claims, that is where the similarities end. First, Barton's parking lot was not a public parking lot, but was purchased by him specifically for the use of his tenants, which were located on his adjacent property. *Id.* at 143. Second, by the time of the taking, Norwalk had enlarged no-parking zones in the area which prevented customers from easily accessing these businesses. *Id.* As a result, the Court found that on-street parking near

Barton's building grew limited. *Id.* In so finding, the Court rejected Norwalk's argument that Barton and his tenants had available parking at the South Norwalk train station because those spaces, the Court found, were far away, unpleasant, and possibly dangerous. *Id.*

These facts are significantly different than those presented here. While Barton had a reasonable expectation of parking near his commercial space because he owned the adjacent property, the Plaintiff here possessed no easement, lease or other right greater than that of the general public to utilize the parking lots in the Isaacs Street neighborhood. Also, unlike *Barton*, the Plaintiff had ample parking in the vicinity of the Subject Property at all times, including the nearby Yankee Doodle Garage, the Leonard Street lot[15] and significant available parking on Main Avenue, Belden Street and Wall Street, none of which the Plaintiff alleges is far away, unpleasant or possibly dangerous. *Exh. A, pg. 39-40, 116-117, 136-137, 167; Exh. F, pg. 17.*

The evidence presented by Barton in support of his claims also differs from the case at hand because Barton was able to provide direct evidence that he was unable to lease space in his building due to the lack of parking. *Barton*, 326 Conn. at 150-52 (plaintiff's real estate broker documented interest from prospective tenants that would not materialize due to the lack of parking). Unlike *Barton*, the Plaintiff here failed to provide any names, details, documentation or other tangible proof that prospective renters, in fact, existed or lost interest due to the fact that the Subject Property was located within the Project Site or because the parking in the Isaacs Street neighborhood had been reduced. *Exh. A, pg. 101*-103.

Barton provided direct evidence that the lack of parking near his building resulted in a loss of interest by prospective tenants, including evidence that prior tenants had left at the end of their leases citing the lack of parking. *Barton*, 326 Conn. at 150-51. Conversely, the Plaintiff

[15] It was only closed between June 2015 and the spring 2016. *Exh. A, pg. 103; Exh. F, pg. 17.*

here has failed to provide any evidence that the alleged lack of parking on Isaacs Street, or the designation of the Subject Property in the LDA, caused prospective tenants, tenants' customers, or purchasers to lose interest in or vacate the Subject Property. *Id.* at 143, 150-152; *Exh. A, pg. 39-40, 101-103, 116-117, 136-137, 167; Exh. F, pg. 17.* Unlike in *Barton*, the Plaintiff did not mitigate his damages by failing to hire a broker or realtor, or proactively attempt to rent the Subject Property. *Exh. A, pg. 119, 121-122, 126*; *City of Bristol*, 284 Conn. at 85-86.

Barton also provided evidence that he lost income as a result of Norwalk's actions. *Barton*, 326 Conn. at 152. Here, the Plaintiff failed to provide any such evidence. Indeed, El Dorado had stable gross sales ranging from $188,064 and $258,426, from 2009 through 2015 (year construction commenced on the Project Site). *Exh. A, pg. 103.* While El Dorado's gross sales decreased in 2016 and 2017, the Plaintiff has failed to provide evidence that his business suffered as a result of the Defendants' actions. *Exh. A, pg. 137, 141-142.*

Finally, Barton provided expert testimony that his property had substantially depreciated in value (by more than 80 percent). *Barton*, 326 Conn. at 144. Contrary to *Barton*, the Plaintiff's own appraiser opines that the value of the Subject Property decreased from $2,500,000 to $2,185,000 from 2007 to 2018. *Exh. O, pg. 2-4; Exh. Q, pg. 1-3.* Thus, according to his own appraisals, the value of the Subject Property had only decreased by $315,000. *Exh. O, pg. 2-4; Exh. Q, pg. 1-3.* Most importantly, the Plaintiff sold the Subject Property to IJ Group Oz, LLC for $1,500,000 on September 2, 2020. *Exh. BB, 1st & 2nd Counts ¶ 24.* This does not meet the criteria for either a categorical or regulatory taking. *Lucas*, 505 U.S. at 1003, 1017-19; *Penn Central*, 438 U.S. at 104; *City of Bristol*, 284 Conn. at 85; *Tamm*, 222 Conn. at 284. Therefore, the Plaintiff has failed to sustain the burden of proof on his inverse condemnation claim.

C. Summary of Unjust Enrichment Case Law

To prevail in a cause of action based on unjust enrichment, a plaintiff must prove: (1) that the defendant received a benefit from the plaintiff, (2) for which the defendant unjustly did not pay, and (3) that the defendant's failure to pay for that benefit was to the plaintiff's detriment. *Wesiman v. Kaspar*, 233 Conn. 531, 550 (1995); *Schirmer v. Souza*, 126 Conn. App. 759, 763 (2011); *McGurk v. Connecticut Light and Power Co.*, 2015 WL 4098248, at *12 (June 4, 2015).

Unjust enrichment is a doctrine based simply on notions of fairness. "As an equitable right, unjust enrichment is based on the principle that in a given situation, it is contrary to equity and good conscious for the defendant to retain a benefit which has come to him at the expense of the plaintiff." *Garwood & Sons Construction, Inc. v. Centos Associated Ltd. Partnership*, 8 Conn. App. 185, 187 (1986); *Schirmer*, 126 Conn. App. at 763 (a "right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscious for one to retain a benefit which has come at the expense of another.") In an unjust enrichment case, courts must decide "whether the circumstances render it just or unjust, equitable or inequitable, conscionable or unconscionable," to apply the doctrine." *Bolmer v. Kocet*, 6 Conn. App. 595, 613 (1986). In an unjust enrichment case, the question is did the defendant, "to the detriment of someone else, obtain something of value to which he was not entitled?" *Franks v. Lockwood*, 146 Conn. 273, 278 (1959).

The Plaintiff's operative complaint asserts that the Defendants were unjustly enriched in the following ways: (a) they warehoused the Subject Property for its future use; (b) allowing the redevelopment project to be advanced; and (c) permitting construction of Phase I improvements. *Exh. BB, 3rd & 4th Counts ¶ 27.*

The Plaintiff's unjust enrichment claims must fail because each assertion does not establish that the Defendants benefitted from their alleged action or inaction. Specifically, the

Plaintiff was in negotiations to sell the Subject Property to POKO, not to the Defendants. *Exh. A, pg. 54-55, 65, 71, 75; Exh. E, pg. 32-33; Exh. K; Exh. L; Exh. M; Exh. N.* The Defendants did not withhold payment from the Plaintiff for the Subject Property as they never attempted to purchase it. *Exh. A, pg. 71, 75; Exh. K; Exh. L; Exh. M; Exh. N.* Since there was no purchase of the Subject Property, the Defendants did not fail to pay for it to the detriment of the Plaintiff. *Exh. A, pg. 71, 75; Exh. K; Exh. L; Exh. M; Exh. N.* There is simply no evidence that the Defendants obtained something of value from the Plaintiff to which they were not entitled when they failed to obtain the Subject Property. *Exh. BB, 3rd & 4th Counts ¶ 27.*

The Defendants did not receive a benefit by virtue of POKO's breach of contract, advancing the development of the Wall Street neighborhood, or from collecting building permit fees and taxes from POKO. They do not constitute, and indeed cannot logically be considered to be, a benefit received from the Plaintiff. The Defendants have found no case law where a court concluded that a party has been unjustly enriched by receiving an alleged benefit from an entity other than the claimant. Thus, the Plaintiff has not met this burden of proof.

Nor can the Plaintiff satisfy the unjust enrichment test by arguing that the Defendants benefitted from allowing the redevelopment project to be advanced or permitting the construction of Phase improvements and receiving real property taxes. *Exh. BB, 3rd & 4th Counts ¶ 27.* Such a claim is contrary to binding case law as the Connecticut Supreme Court held that an action for unjust enrichment could not be maintained by a taxpayer seeking a refund of personal property taxes because there was a statutory procedure available that was "more than sufficient in providing the [taxpayer] a method by which a refund could be obtained." *National CSS, Inc. v. Stamford*, 195 Conn. 587, 597 (1985); *Town of Plainville v. Almost Home Animal Rescue and Shelter, Inc.*, 182 Conn. App. 55, 69 (2018). Notably, the payment of taxes is not to

the plaintiff's detriment as it would protect his interest in the property. *Julia Tate Properties, LLC v. Wood Park Development, LLC*, 2013 WL 4046696, at *5 (July 18, 2013). This would also apply to anticipated future taxes as well.

The Plaintiff's claims of unjust enrichment in the operative complaint, fail to meet the standards required by the Connecticut courts to survive this motion for summary judgment. Therefore, the Defendants are entitled to judgment as a matter of law.

IV. Conclusion:

For the reasons set forth above, the Defendants are entitled to summary judgment as to all counts of the Plaintiff's operative complaint as a matter of law.

DEFENDANTS: CITY OF
NORWALK & REDEVELOPMENT AGENCY
OF THE CITY OF NORWALK, CONNECTICUT

By /s/ Brian Candela /s/ 423280
Brian Candela
bcandela@norwalkct.org
Assistant Corporation Counsel
125 East Avenue, Room 237
Norwalk, CT 06851

CERTIFICATION

I hereby certify that a copy of the foregoing was transmitted via electronic mail or mailed, postage prepaid, on November 24, 2020, to:

Daniel A. Benjamin, Esq.
Benjamin Gold & Troyb, P.C.
350 Bedford Street, Suite 403
Stamford, CT 06901
dan@bgtlawfirm.com

Brian Candela /s/ 423280
Brian Candela
Commissioner of the Superior Court